regularly there must be an affidavit of merits. In the present case, if the subject-matter of the suit were gambling transactions then that would be a *prima facie* defence. The power to set aside a regular judgment however is discretionary and in exercising its discretion the court may, apart from the question of merits, consider the conduct of a defendant, *viz.*, whether he has been guilty of laches in making the application and his explanation, if any, as to why he neglected to appear after having been served and why he allowed the judgment to be regularly obtained. (See judgment of Lord Wright in the above case). I am aware of the case of *Attwood* v. *Chichester*,(5) often cited as the authority for the view that lapse of time is no bar to an application to set aside a default judgment, but this proposition seems to me to be subject to this qualification, *viz.*, that the conduct of the defendant should be *bona fide*. In that case a default judgment against a married woman was set aside about a year after it was signed. The defendant had a good defence but the objection of lateness did not prevail as she had not acted *mala fide*. Bramwell L.J. said at page 724:—

"But then has her conduct been *bona fide*? Has she acted merely with want of care and through ignorance, or did she really intend to suffer judgment and make herself liable upon the documents which she had signed?

And in the same case Brett L.J. said at page 724:—

"From the facts, before us, I draw the inference that when she handed the writ to her husband, she did not understand its meaning, and that she did not know the consequences of suffering judgment by default. . . . . Now, if it could have been shewn that the object of the writ was at the time of service explained to her, she could not at this stage of the proceedings have been permitted to defend after suffering judgment by default; but she does not appear to have been informed by her husband what her position really was."

As one operating the business of a rubber dealer, it is difficult to see how the defendant could plead ignorance of the nature and purpose of the writ with which he was served and the result of any default in attending to it. He has given no reason why he omitted to appear at the proper time or why he allowed the judgment to be regularly obtained instead of putting up a defence such as that now shown in his affidavit, and he has certainly not improved his position by making payments to the plaintiffs towards his judgment debt amounting in all to a sum of $8,150. It was only after six years from the date of judgment that he thought of bestirring himself at all, and that too when he was served with a bankruptcy notice. I find that the defendant has been guilty of laches and that his conduct has not been *bona fide*.

For these reasons I dismiss the application with costs.

Application dismissed.

Solicitors: *Lee Boon Peng; Joseph & Son.*

CHEW KONG KAH v. CHEU KUAN CHENG

[O.C.J. (Raja Azlan Shah J.) October 10, 1966]

[K.L. — Civil Suit No. 453 of 1964]

Practice and Procedure — Consent order agreed to by counsel — Party applying to set aside order before it was drawn up and perfected — Jurisdiction of the court.

The plaintiff applied to set aside a consent order which had been consented to by his counsel. The consent order had not been drawn up and perfected and it was alleged that the counsel gave his consent under a misapprehension.

Held: as the consent order had not been drawn up and perfected in this case, and as there appeared to be some misapprehension on the part of counsel the application to set aside the order will be granted and the case restored to the hearing list.

Cases referred to:—

(1) *Holt* v. *Jesse* (1876), 3 Ch. D. 177.

(2) *Neale* v. *Gordon-Lennox* [1902] A.C. 465.

(3) *Shepherd* v. *Robinson* [1919] 1 K.B. 474.

(4) *Strauss* v. *Francis* L.R. 1 Q.B. 379.

(5) *Matthews* v. *Munster* (1887), 20 Q.B.D. 141.

(6) *Welsh* v. *Roe* (1918), 87 L.J. (K.B.) 520.

(7) *Dietz* v. *Lenning Chemicals Ltd.* [1966] 2 All E.R. 962, 964.

(8) *Little* v. *Spreadbury* [1910] 2 K.B.D. 658.

CIVIL SUIT.

Peter Yeo for the plaintiff.

Morris Edgar for the defendant.

Cur. Adv. Vult.

Raja Azlan Shah J.: This case came on for hearing on February 18, 1966 and was adjourned for further hearing to June 1, 1966. The plaintiff claims for a declaration that both he and the defendant are partners in equal shares in the ownership of a cinema hall, an order that the partnership be dissolved and the affairs be wound up by the court, for the appointment of a receiver and manager and the taking of accounts, and damages. The defendant alleges that the plaintiff held only one-third share in the partnership. At the resumed hearing the case was settled in chambers in the presence of both counsel but without the parties being present. Before the consent order was drawn up and perfected, the plaintiff, on being told of the terms of the settlement, immediately notified the registrar and counsel for the defendant of his intention to apply to set aside the consent order and the case to be restored to the hearing list. He accordingly filed his application by way of motion. The following facts appeared from the affidavit filed by the plaintiff.

Para. 5

"My grounds for not honouring the oral arrangement made by my counsel with counsel for the defendant are as follows:

(i) The sum of $20,000 for arrears of rental is not even up to the sum of $24,000 proposed by Y.M. Raja Azlan Shah J. when this case was part-heard in open court.

(ii) My counsel had no authority to sell or transfer my share in the theatre building itself before the extent of such share was properly decided by the court.

(iii) For purposes of a sale (when such a step is agreed upon) my counsel should have suggested that both parties in fairness and justice should bid by secret tender for the theatre building so that the higher bidder would take over the other party's share.

(iv) It is grossly inequitable for counsel to agree to the refund of $16,000 to me for taking over my share which in my contention constituted 50% of the building.

(v) Both counsel should have reduced to writing all the terms and conditions of settlement in such a complicated case so that I on my part might have the opportunity of showing the draft agreement to others for advice.

(vi) My counsel failed to write out the terms to which I could affix my signature as signifying consent.

(vii) Furthermore the settlement was reported in chambers after the matter had been part-heard in open court. At least the parties should have been publicly or in chambers told of these terms by a qualified interpreter. As matters stood, both litigants were kept out of the chambers when counsel reported settlement.

Para. 9

"Under the circumstances I am advised and verily believe that my counsel acted beyond his authority and compromised on an issue extraneous to the matter or scope of litigation contained herein."

The affidavit of counsel for the plaintiff, filed for the purpose of taxation, is relevant in these matters and reads as follows:

Para. 5

"At the resumed hearing of the case on the 1st day of June, 1966, the learned trial judge suggested that the parties should be well advised to settle the matter and with the consent of the plaintiff a settlement was reached whereby the plaintiff was to be paid the sum of $16,000 contributed by him and a further sum of $20,000 by way of his share of profits payable by instalments of $500 per month and the plaintiff was also awarded his costs on the higher scale and such costs were to be taxed by the proper officer of the court. The court was duly informed of the settlement and the learned judge made an order accordingly.

Para. 6

"With regard to paragraph 5 of the said affidavit there is no necessity for a written consent from the plaintiff for settlements in court are orally agreed to once the terms are clearly explained, understood and accepted by both parties to the action.

Para. 7

"The terms were very clearly explained to the plaintiff by the deponent with the assistance of the court interpreter and the plaintiff perfectly understood the same and voluntarily gave his consent thereto."

Mr. Peter Yeo for the plaintiff submitted that counsel gave his consent under a misapprehension and argued that the present case falls within the class of cases represented by *Holt* v. *Jesse* [1] and *Neale* v. *Gordon-Lennox.* [2] He relied on *Shepherd* v. *Robinson* [3] where Bankes L.J. in the Court of Appeal drew the distinction between the two lines of authority relating to compromises said to have been made by counsel against the wishes or restrictions of their clients. The first line of authority is that represented by *Strauss* v. *Francis,* [4] *Matthews* v. *Munster,* [5] and *Welsh* v. *Roe.* [6] In all these cases the question was whether the act of counsel had been within the scope of his authority. The second line of cases is represented by *Holt* v. *Jesse, supra,* and *Neale* v. *Gordos-Lennox, supra.* They decide that before a consent order has been drawn up and perfected the consent given by counsel or solicitor may be withdrawn by the client if the counsel or solicitor gave it under a misapprehension. In such cases the court will not proceed further with the drawing up and perfecting of the order and will not lend its authority to compel observance of an agreement arrived at through a mistake. It is immaterial whether the mistake was as to some particular matter forming part of the basis of the settlement or whether it was as to counsel's authority to make a settlement (see Bankes L.J. on pages 477, 479). In that case the plaintiff sued the defendant for a sum of money. The defendant had been represented by a firm of solicitors, but immediately before the hearing, when it was too late to give any effective notice of change of solicitors, he had placed his interests in the hands of another firm of solicitors still remained on record, while a clerk of the second firm also informally represented her at the trial. On a proposal for settlement, counsel for the defendant, believing that he had authority to consent, accepted the proposal. Before the judgment had been drawn up and entered, the defendant applied to have the action restored to the hearing list on the ground that her solicitors and counsel had no authority to settle the case. Darling J. expressed the opinion that counsel had only done what he was bound to do, but that there might have been some misapprehension as to the solicitor's authority to make the settlement. He therefore restored the case to the list for hearing. On appeal by the defendant the Court of Appeal held that the facts brought the case within the class of authorities of which *Holt* v. *Jesse, supra,* and *Neale* v. *Gordon-Lennox, supra,* are examples. That principle, as represented by *Holt* v. *Jesse* and others, was re-stated by Lord Denning in *Dietz* v. *Lenning Chemicals Ltd.* [7] in the following form:

"The law is settled by a series of cases, particularly *Holt* v. *Jesse* and *Harvey* v. *Croydon Union Rural Sanitary Authority.* They show that if, before a consent order is drawn up, it appears that the consent was given under a misapprehension or from a misstatement or want of materials, then the party can come to the court and ask that it be not drawn up. Of course, he cannot come without good reason. If he seeks arbitrarily to get out

of it, the court will not listen to him; but, if he has any good reason, then he can come and ask that it should not be made an order of the court, and that it be set aside."

In that case, the plaintiff's husband was killed in an accident whilst employed by the defendants. A settlement of the claim of the widow was arranged, subject to the approval of the court, before any action was begun. A summons for approval of the settlement was taken out. The plaintiff later re-married. The settlement was then approved by the court without knowledge of the re-marriage. Before the order was drawn up and perfected the plaintiff told her solicitors of her re-marriage; they told the defendants' solicitors, and the order was set aside because it was made under a misapprehension induced by an innocent misrepresentation.

Mr. Morris Edgar, on behalf of the defendant, relied on *Little* v. *Spreadbury* (8) which lays down the principle that if a client by his conduct induces his solicitor to believe that he is authorized to make a certain compromise in an action which the solicitor is conducting on behalf of the client, and the solicitor, reasonably relying on that conduct and believing that he has the authority of the client, makes the compromise, the client is bound whether he intended to give that authority or not and whether he in fact understood or did not understand the terms of the compromise (*per* Bray J. on page 664). The head-note of that case reads:

"Before a county court action was tried a settlement was arrived at between the solicitors for the respective parties and a memorandum embodying its terms was signed by the solicitors. This memorandum was not read by the defendant, but it was read over to her by her solicitor or his son, and she seemed to assent to its terms. The action was thereupon, by consent of the county court judge and the solicitors on both sides, struck out. Although the defendant seemed to assent to the terms of the compromise she did not in fact understand them and did not mean to assent to them. Subsequently an agreement in writing, signed by the solicitors for both parties, containing the terms of the memorandum was sent to the defendant, who repudiated it upon the ground that the terms of the compromise which she authorized her solicitor to effect were not contained either in the memorandum or in the written agreement. It was held that the defendant was bound by the compromise made by her solicitor and was liable in damages for the breach of it."

The distinction between these two lines of authority is well pointed out by Bray J. in the above case. After dealing with the facts in *Neale* v. *Gordon-Lennox, supra,* the learned judge went on to distinguish that case from the case before him, and on page 663 he said:

"In the present case we have only to consider the question which ordinarily arises upon any contract that is signed by an agent, namely, whether that agent had authority to bind the principle."

To my mind, the distinction between these two lines of authority is this. In one, a consent order not drawn up and perfected can be set aside if it appears, and I emphasize the word "appears", that the consent was given under a misapprehension or from a misstatement or want of materials; it is immaterial whether the misapprehension etc. is in respect of a particular matter which forms part of the settlement or whether it is as to counsel's authority. In the other, the only question to be asked is whether the act of counsel is within the scope of his ostensible authority. The real question to be decided in the present case is whether, a consent order never having been drawn up, the facts bring the case within the principle of *Holt* v. *Jesse, Neale* v. *Gordon-Lennox,* and *Dietz* v. *Lenning Chemicals Ltd.* In my opinion the answer is in the affirmative. Here there was an arrangement between the parties to settle the case in the form of paragraph 5 of counsel's affidavit. The order had not been drawn up, it was not perfected. The applicant seeks to set aside the consent order on the ground that counsel had acted under a misapprehension. On reading the two affidavits, it is difficult to avoid the conclusion that there might have been some misapprehension on the part of counsel as to some particular matters which form part of the basis of the settlement. I therefore order the case to be restored to the hearing list. Costs thrown away to defendant in any event.

Order accordingly.

Solicitors: *Heng, Chen & Co.; Morris Edgar & Co.*

JIM THIAN SIONG & ANOR. v. RANDHIR SINGH

[F.C. (Wee Chong Jin C.J. (Singapore), Tan Ah Tah F.J. and Ambrose J.) October 11, 1966]

[Singapore — Federal Court Civil Appeal No. Y31 of 1966]

Practice and Procedure — Judgment in default of appearance — Application to set aside — Application granted on payment of amount claimed into court — Whether condition reasonable.

The respondent had obtained judgment in default of appearance on a claim in respect of a moneylending transaction against the appellants. The appellants applied to have the default judgment set aside and for leave to defend. In support an affidavit was filed which disclosed a *prima facie* defence to the action. The learned judge who heard the application allowed it on condition that the amount claimed in the action should be paid into court. The appellants appealed against that part of the order imposing this condition.

Held: it was clear on the facts and in the particular circumstances of this case that if the condition imposed were allowed to stand, the appellants would be unable to comply with it and would be prevented from defending the action and therefore in the circumstances, the appellants should be allowed to defend on condition of payment of all costs thrown away as a result of their failure to enter appearance.

CIVIL APPEAL.

K. K. Bezboruah for the appellants.

R. Murugason for the respondent.